

DEPARTMENT OF STATE REVENUE

04-20150123.LOF

Letter of Findings Number: 04-20150123
Sales and Use Tax
For Tax Years 2011-13

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Retail business did not prove that the Department's calculations of sales tax which should have been collected were incorrect. Therefore, the Department's proposed assessments for sales tax were proper.

ISSUES**I. Sales Tax—Additional Sales.**

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-2-1; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests proposed assessments for additional sales tax.

II. Tax Administration—Penalties and Interest.

Authority: IC § 6-8.1-5-4; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of penalties and interest.

STATEMENT OF FACTS

Taxpayer is a retail business with gasoline sales and an attached convenience store. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had underreported taxable sales for the tax years 2011, 2012, and 2013. The Department therefore issued proposed assessments for sales tax, penalties, and interest for those years. Taxpayer protested a portion of the assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as needed.

I. Sales Tax—Additional Sales.**DISCUSSION**

Taxpayer protests a portion of the Department's proposed assessments of sales tax for the tax years 2011 through 2013. Specifically, Taxpayer states that the cost of goods sold ("COGS") percentage used by the Department was too low and resulted in overstated calculation of profits. Taxpayer believes that a different COGS percentage is more accurate and its use in the Department's calculations would result in a more accurate calculation of profits.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar,

Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

(Emphasis added).

Therefore, retail merchants are required to collect sales tax on retail transactions, unless the transaction is exempt from sales tax.

Next, the Department refers to IC § 6-8.1-5-1(b), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

(Emphasis added).

Also, the Department refers to IC § 6-8.1-5-4(a), which states:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

(Emphasis added).

Therefore, all taxpayers subject to a listed tax must keep books and records such as, but not limited to, invoices, register tapes, receipts, and cancelled checks, as provided by IC § 6-8.1-5-4(a). If the Department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department, as provided by IC § 6-8.1-5-1(b).

In the instant case, Taxpayer initially only provided the Department with bank statements which were not sufficient to determine taxable sales. The Department therefore decided to use the best information available to determine taxable sales. Taxpayer then provided purchase invoices which the Department reviewed and calculated Taxpayer's taxable sales by using a COGS percentage found on "BizStats.com" ("BizStats"). Those calculations resulted in the determination that Taxpayer had additional taxable sales for the tax years at issue, which in turn resulted in additional sales tax which Taxpayer should have collected and remitted, as provided by IC § 6-2.5-2-1(b).

Taxpayer protests that the BizStats COGS category used by the Department is not the most precise category for its business. Taxpayer states that the Department used the BizStats category "Food, beverage and liquor stores" with a COGS percentage of 73.66 in its calculations of taxable sales for each of the years at issue. Taxpayer offers a different COGS category provided by BizMiner, BizStats' parent company, which it believes is more accurate and which has a higher COGS percentage.

Specifically, Taxpayer believes that the BizMiner category "Gasoline Stations with Convenience Stores" is a more accurate category for its business. The BizMiner category provides COGS percentages of 89.38, 88.29, and 89.70 for 2011, 2012, and 2013 respectively. Using the BizMiner COGS percentages in the Department's calculations resulted in significantly lower amounts of taxable sales and thus significantly lower amounts of sales tax due for each of the three years at issue. Taxpayer states that the use of a BizStats category which includes alcohol sales and which excludes gasoline sales in the Department's calculations incorrectly lowered the COGS percentage for its store, since it does not sell alcohol and it does combine gasoline store sales with its convenience store sales. This, Taxpayer argues, in turn incorrectly increased the amounts of taxable sales as calculated by the Department.

The Department does not agree with this conclusion. First, the Department separately calculated gasoline store sales, so gasoline sales should not be included in the COGS percentage applied to the convenience store sales calculations. Second, the Department did not use "Food, beverage and liquor stores" as a COGS category from BizStats. Rather, the Department used the sub-category "Food and beverage stores" which only includes food and beverage sales. Alcohol is not included in this category. Therefore, the Department did not include alcohol sales in its calculations of Taxpayer's COGS. Taxpayer's reasoning does not withstand review.

In conclusion, the Department was correct to use the best information available to determine Taxpayer's total and taxable sales for the tax years 2011, 2012, and 2013, as provided by IC § 6-8.1-5-1(b), since Taxpayer failed to keep documents it was required to keep under IC § 6-8.1-5-4(a). Taxpayer's position that the Department should have used a different COGS percentage in its calculations of Taxpayer's taxable sales is incorrect. The Department separately calculated gasoline sales and convenience store sales. The BizStats category "Food and beverage stores" does not include alcohol sales as Taxpayer feared and was therefore the correct category to use in its calculations. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Penalties and Interest.

DISCUSSION

Taxpayer protests the imposition of penalties pursuant to IC § 6-8.1-10-2.1 and the imposition of interest pursuant to IC § 6-8.1-10-1. The Department notes that waiver of interest is not permitted under IC § 6-8.1-10-1(e). Penalty waiver is permitted if the taxpayers show that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence", on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer protests the Department's assessment of penalties and interest. After review of the documentation and analysis provided in the protest process, the Department may not waive interest, as provided by IC §6-8.1-10-1(e). Taxpayer failed in its duty to keep sales records as required under IC § 6-8.1-5-4(a). Taxpayer has not affirmatively established that it exercised ordinary business care in this case. Therefore, waiver of

penalties is not warranted under [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest to the imposition of penalties and interest is denied.

SUMMARY

Taxpayer's Issue I protest regarding the imposition of adjusted gross income tax is denied. Taxpayer's Issue II protest regarding the imposition of penalties and interest is denied.

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An [html](#) version of this document.